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NO. 80-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR. AND
SUE FURGER LESTER,
Petitioners

v.

LAURA ANDERSON, EXECUTRIX OF THE
ESTATE OF R. C. ANDERSON,
Respondent

ON WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

Motion of Consumer Federation of America For Leave To File Brief As Amicus Curiae And Brief of Consumer Federation of America As Amicus Curiae

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The Consumer Federation of America respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorney for the Petitioner herein has been obtained, but consent for the filing of this brief has not been obtained from the attorney for the Respondent.

The Applicant, Consumer Federation of America has an interest in this case to the degree that it is an organization existing for the purpose of representing consumer interests.

The petition for writ of certiorari filed by the Petitioner herein argues that ownership of property transferred to Petitioner as a result of the credit transaction which is the subject of this action should vest to the Petitioner due to Respondents failure to comply with subsection 1635(b) of the Federal-Truth-in Lending Act. It does not, however, discuss Congressional intent with regard to that subsection or the result of the courts' failure to so rule. Applicant has no reason to believe that this point will be expanded and made complete in this Court. If this argument is approved by this Court, the decision of the court below must be reversed.

Respectfully submitted,

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By: _____

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Brief of Consumer Federation Of America As Amicus Curiae

INTEREST OF AMICUS CURIAE

Consumer Federation of America is a federation of over two hundred national, state and local non-profit

organizations that have joined together to expouse the consumer viewpoint. Among its membership are Consumer Union publisher of *Consumer Report,* 17 co-operatives and credit union leagues, 45 state and local consumer organizations, 66 rural electric co-ops and 16 national labor organizations. The interest of Consumer Federation of America is limited to a concern that the Federal-Truth-in-Lending Act and Federal Reserve Board Regulation Z remain valuable and useful to consumers.

SUMMARY OF THE ARGUMENT

Section 1635(b) of the Truth In Lending Act and § 226.9(d) of Regulation Z both set forth a detailed schema which governs the actions of both parties when a customer chooses to rescind a credit agreement in accordance with the Act. The Federal Reserve Board and at least one Circuit Court have opined that a creditor's failure to comply with the subsection results in ownership of all property transferred to the customer vesting in the customer. Other courts have refused to strictly construe the subsection and have refused to apply this vesting rule. The result has been confusion with respect to application of the subsection and the consequences of a creditor's failure to comply.

The wholesale modification of the explicit statutory rescission procedure would be contrary to congressional intent and the purpose of the subsection. The application of the "vesting rule" is critical in order to create the incentive for voluntary compliance by creditors.

ARGUMENT

I.

The purpose of the detailed statutory procedure for Rescission under Truth-In-Lending is to shift the burdens which are applicable to Common Law Rescission and to insure that the Customer will not have to take legal action to seek Restitution from the Creditor.

An analysis of the rescission provision of the Truth-In-Lending Act, 15 U.S.C.A. § 1635, should begin by recognizing that Congress was not silent about the effect of an act of rescission. Such silence would be presumed to have meant that rescission under the T.I.L.A. was to carry the same requirements and have the same effect as in common law or as rescission under the Uniform Commercial Code.

Quite to the contrary, Congress provided a detailed statutory schema governing the effect of a proper rescission by a customer and what actions each party must take. 15 U.S.C.A. § 1635(b); *see also,* 12 C.F.R. § 226.9(d). That schema may be summarized as follows:

1. Immediately upon rescission the customer is relieved of liability for any finance charge or other charge under the contract.
2. Immediately upon rescission the security interest becomes void.
3. The creditor, within 10 days, must return any money or property which the customer may have given.
4. The creditor, within 10 days, must take all action necessary to reflect termination of the security interest.

5. The customer may retain any property in his or her possession until the creditor performs the duties imposed by this section.

6. Upon the creditor's performance of those duties, the customer must tender that property back to the creditor.

7. If the creditor does not take possession of the property within 10 days of tender by the customer, ownership vests in the customer.

The purpose of this detailed statutory machinery is not specifically set forth in the Act. It is evident, however, that Congress was dissatisfied with the traditional rules surrounding the remedy of rescission. In response, what it has plainly attempted to do is to create a subtle shift in burdens. Not only a shift in legal burdens of proof, but also a shift in the practical burden of going forward in the case of a dispute.

At common law, restitution is an essential element of rescission, and rescission is effective only if the rescinding party makes a tender or unconditional offer to return the consideration received. *See,* Note, *Truth-In-Lending: Judicial Modification of the Right of Rescission,* 1974 Duke L.J. 1227, 1229-30. The ultimate goal of the common law rules governing rescission is to restore the status quo and to avoid allowing the rescinding party to be unjustly enriched as a result of its act of rescission. To effect common law rescission, the buyer bears the risk that the seller will not return the consideration which has been paid prior to rescission. If that should occur, the rescinding party bears the burden of going forward with judicial action seeking restitution.

Rescission under the Federal Truth-In-Lending Act exists for a different reason than rescission in common law or provided by the Uniform Commercial Code. The latter provide rescission as a buyer's remedy where circumstances render a contract void or voidable or nonconformance with contract terms substantially impairs its value to the buyer. *See generally,* U.C.C. §§ 2-601, 2-602. Truth-In-Lending rescission is not really a remedy at all. It is a creature of statute arising from congressional concern that a person's or family's homestead be lightly or unknowingly used as security for a loan. The right to rescind applies to any consumer credit transaction in which a security interest is or will be taken on real property which is used or expected to be used as the principal residence of the customer. 15 U.S.C. § 1635(a); 12 C.F.R. 226.9(a). The right exists for three business days following the date of the consumation of the transaction, receipt of a notice of the right to rescind, or receipt of all of the material disclosures required by the T.I.L.A. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.9(a).

The ultimate goal of the Truth-In-Lending rescission provision is also a return to the status quo. Congress, however, recognized that both parties have obligations upon rescission and it is impossible to act on them simultaneously. There are steps in the return to status quo, and, through the schema of Section 1635(b), Congress intentionally places the consumer in a strong position during the journey. It might be logical, as the Supreme Court of Arkansas opined, to require the customer to act first and bear the risk of the creditor responding in bad faith. *Turner v. West Memphis Federal Savings & Loan Assn.,* 588 S.W.2d 691, 696 (Ark. 1979). It is not logic, however, but the statute itself which should rule.

II.

The statutory procedure for Rescission set forth in Section 1635(b) should be liberally construed to affect its purpose. Thus, a Creditor's failure to fulfill the requirements of the subsection should relieve the Customer of the Duty to Tender Property which has already been transferred and result in Ownership of that Property Vesting in the Customer.

The important issue now before the Court arises out of the fact that the Act does not specifically state what will be the effect of a creditor's failure to perform the requisite statutory duties within 10 days from receipt of a customer's notice of rescission.[1] This response, to a notice of rescission would effectively take away from the consumer the upper hand which Congress intended. The lien would be void but still on file. The customer would be entitled to certain property but wouldn't have it.

With this in mind the Fifth Circuit had initially taken the unequivocal position that a creditor's failure to perform would result in ownership of all property in the customer's possession vesting in the customer. *Sosa v. Fite*, 498 F.2d 114 (5th Cir. 1974). In doing so, the Court relied upon legislative intent and cited legislative history.

> That this result was intended is clear beyond preadventure, for one of the measure's principal sponsors in the house states: "[I]f the seller does not come back to pick up [his property] after the 10-day period [following the notice of rescission], the buyer can keep this item and he does not even have to

1. This 10 day requirement was changed to 20 days by the Truth-In-Lending Simplification and Reform Act P.L. 96-221. *See*, CCH Installment Credit Guide, Report 304, p. 1553 (April 30, 1980).

> pay for it . . ." *Sosa, supra* at 119, 120 (citing 114 Cong. Rec. 14398 (1968)).

The Federal Reserve Board took an identical position in a Public Information Letter dated May 29, 1975.

> Where the creditor has delivered property to the customer, Section 226.9(d) provides that he may retain possession of it; upon the creditor fulfilling his obligations under the subsection is the customer required to make tender of the property to the creditor. *If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirement of the subsection, and staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without obligation.* CCH, Consumer Credit Guide, 31,230 (1974-1977 Transfer Binder) (emphasis added).

The Supreme Court has held that opinions of the Federal Reserve Board should be given great weight in construction of the Truth-In-Lending Act. *Ford Motor Credit Company v. Milhollin*, ____U.S.____, 100 S.Ct. 790, ____L.Ed.2d____ (1980).

This vesting remedy provides a strong incentive for the creditor to follow the statutory schema. That the remedy is harsh cannot be denied. Its fairness, however, should be viewed in light of the fact that the creditor can easily avoid the harsh result by simply complying with the mandate of the Act. This was recognized in *Sosa*, the Court noting that ". . . [The creditor's] lament of any inequity being visited upon them is utterly unpersuasive for the power was completely theirs to prevent this parade of creditor horribles from ever occurring." *Sosa, supra* at 120.

By complying with the provisions of the Act, the creditor does not give up the right of restitution. It does release its lien. That lien, however, is void upon notice of rescission in any case. 15 U.S.C. § 1635(b). The fairness of this requirement should also be viewed in light of the fact that there are other mistakes a creditor can make which will result in the loss of an effective lien. In Texas, for example, failure to have a written contract signed by both the husband and wife will result in a lien on homestead being void. Tex. Fam. Code, Section 5.81. Failure to comply with the Texas Home Solicitation Sales Act will result in a lien on personal property being void. Tex. Rev. Civ. Stat. Ann., Art. 5069-13.01 et. seq. Also, failure to properly file many types of liens will result in their being ineffective with regard to third parties. The creditor is also required to restore the customer to his or her former position by returning all payments previously made.

Some authorities consider it inequitable to require the lender to release the lien and return payments without any expectation of receiving anything of value in return. *Turner v. West Memphis Savings & Loan Assn., supra* at 696. One must question how this is more inequitable, however, than requiring the customer to return all of the money or property received with no expectation that the lien will be released or the money paid to the creditor returned. Even the Uniform Commercial Code, which is not designed with consumer interest in mind, does not place so heavy a burden on a buyer who rejects goods or revokes a contract. Under the U.C.C. the revoking party has the duty only to hold the goods for the seller and not take action inconsistent with the seller's ownership. *See*, U.C.C. §§ 2-602, 2-608. Furthermore, the U.C.C. pro-

vides the buyer with protection, in form of a security interest on goods in its possession and control, against the seller's failure to make restitution. U.C.C. § 2-711(3).

Congress has not deviated from common principles of equity in formulating Section 1635(b) of the Truth-In-Lending Act. Its intent in providing the course that each party is to take upon notice of rescission should not be ignored.

The vesting rule expressed by the Federal Reserve Board and in *Sosa* is the heart of this rescission procedure. The Supreme Court of Colorado, interpreting an identical provision in the Uniform Consumer Credit Code states,

> . . . [It] is intended as an impetus for the creditor to take immediate action to clear title and to fulfill its obligations. If not interpreted in this way, there is no stimulus for the creditor to comply with the statutory provisions requiring him to release the security interests within the ten day period. *Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720, 725 (Colo. 1976).

The stimulus must be strong in order to encourage voluntary compliance. Voluntary compliance is a central concept of the Truth-In-Lending Act.

III.

Judicial modification of the Rescission Procedure set forth in Section 1635(b) and refusal in some instances to apply the "Vesting Rule" reduces the likelihood of Voluntary Compliance with that Subsection.

The "vesting rule" has not been enthusiastically accepted by all courts. In fact, in a recent decision, the Fifth

Circuit has substantially modified it. *Gerasta v. Hibernia National Bank,* 575 F.2d 580 (5th Cir. 1978).

The result in *Gerasta,* that the creditor's failure to take the requisite action within 10 days did not result in ownership of property vesting in the customer, was opposite that of *Sosa.* The Court, however, specifically distinguished rather than overruled *Sosa. Gerasta, supra* at 584 (footnote 3).

The first distinction made by the Court in *Gerasta* focused on an amendment of the remedies provision of Truth-In-Lending. 15 U.S.C. § 1640. The statute originally provided statutory damages only for a creditor's failure to disclose any information "required under this part." As amended in 1974, the remedies section applies to all failures to comply with the requirements of the Act, including those requirements of the rescission provision in § 1635. *Sosa* was based on the Act prior to the 1974 amendments. It was thus implied in the *Gerasta* opinion that there was no remedy, other than vesting, for the creditor's failure to properly react to Mrs. Sosa's rescission notice. But the *Gerasta* opinion saw a remedy under the amended version of Truth-In-Lending. *Gerasta, supra* at 593.

Many cases, however, involve a claim for statutory damages for the creditor's failure to make proper disclosures in addition to the action for rescission. Indications are that only a single recovery of statutory damages under the Act may be awarded to each customer even though there are multiple violations. *See, Turner v. Firestone Tire and Rubber Co.,* 537 F.2d 1296 (5th Cir. 1976). Thus, where both disclosure violations and rescission are claimed there is no effective remedy for a credi-

tor's failure to follow the statutory procedure. Except for the vesting rule applied in *Sosa,* a creditor would be able to ignore the customer's rescission without risk of increased liability.

In some cases disclosure violation may not be claimed or such a claim may be barred by the one year statute of limitations, 15 U.S.C. § 1640(e). Even then, the maximum recovery of $1000.00 under 15 U.S.C. § 1640(a) provides little incentive for voluntary compliance. This is obvious when the amount which the creditor may stand to gain by ignoring the rescission is considered, rescission being most commonly applicable in cases involving relatively large loans or home improvement contracts. It is also obvious when the amount which the creditors may stand to save in legal expenses by ignoring the rescission and thus reversing the burden of going forward is considered. The creditor will win disputes by default whenever a customer cannot bear the expense of legal action.

A second distinction between *Gerasta* and *Sosa* is reflected in the facts of each case. The notice of rescission by Mrs. Sosa included an express offer to return the property then in her possession. *Sosa, supra* at 118. The Gerastas, on the other hand stated in their rescission notice that they refused to tender the loan proceeds until the Bank performed its statutorily prescribed duties. *Gerasta, supra* at 584.

The facts in many instances will fall between *Gerasta* and *Sosa,* the notice of rescission being silent with regard to the disposition of the property in the customer's possession. This appears to be the case in the Petition now before the Court.

Customers in consumer credit transactions are likely to be unsophisticated in the use of credit. Furthermore, they may be using a form provided by the creditor, in giving notice of rescission. It is hard to imagine that, by its opinion in *Gerasta,* the Fifth Circuit intended to place a duty on customers to inform creditors of their legal rights in the event of rescission. What is more likely is that the Court focused on the language of the rescission notice as an indication of the equities of the case and the state of mind of the parties.

Rescission under the Federal Truth-In-Lending Act is a statutory right, not an equitable remedy. *See, Palmer v. Wilson,* 502 F.2d 860, 861 (4th Cir. 1974). Nonetheless, courts cannot be expected to apply the statute blindly when to do so would yield a patently inequitable result. Several Circuit Court decisions have refused to apply the vesting rule and allow a complete windfall to the customer (as in *Sosa*) where the circumstances indicated that it would be inequitable to do so.

A Fourth Circuit decision is illustrative in that it focused on the attitude of both parties to determine the equities. *Powers v. Sims & Levin,* 542 F.2d 1216 (4th Cir. 1976). There the majority found that the creditor had acted in good faith in that there was a real dispute as to whether the facts which the customer alleged to be the basis of the right to rescind were true. *Powers, supra* at 1218. The customer, on the other hand, unequivocally refused to tender a portion of the money the creditor had paid out under the transaction. *Powers, supra* at 1220, 1221. The majority thus found that there had been an anticipatory breach on the part of the customer rather than a rescission under Truth-In-Lending Act. *Powers, supra* at 1220.

Several decisions refusing to apply the "vesting rule" have modified the statutorily prescribed rescission procedure. Yet no clearly articulated standard for when such modification is appropriate has arisen. The *Gerasta* and *Powers* opinions reveal two circumstances which are relevant. The first is the existence of bad faith of the customer, the second is evidence that there is a real question of the propriety of the rescission. A third circumstance may be the creditor's good faith effort to comply with the statutory procedure. For example, the Fifth Circuit has found it to be proper for a creditor to offset the value owed to it by the customer from the sum it initially returns to the customer. *Harris v. Tower Loan of Mississippi, Inc.*, 609 F.2d 120 (5th Cir. 1980).

Other decisions have reached the same conclusion without providing a clear rationale. The Tenth Circuit in *Rachbach v. Cogswell*, 547 F.2d 502 (10th Cir. 1976) held that because of an incomplete record of the trial, it could not say that the trial court had abused its discretion in imposing an equitable condition on the right of rescission. In *Palmer v. Wilson*, 502 F.2d 860 (9th Cir. 1974). The Ninth Circuit held that the requirement of tender may be equitably imposed where the customer seeks both rescission and statutory damages plus attorney fees. The facts in that case were not set forth in enough detail to determine what equitable consideration may have been present. *See also, Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935 (9th Cir. 1975); *La Grone v. Johnson*, 534 F.2d 1360 (9th Cir. 1976).

A Fifth Circuit opinion reported after *Gerasta* refuses to apply the vesting rule even though there appear to be no special circumstances for doing so. This case, with little discussion, seems to blindly follow the outcome of

Gerasta. It ignores the *Gerasta* opinion's explicit statement that it did not overrule *Sosa. Bustamante v. First Federal Savings and Loan Association,* 619 F.2d 360 (5th Cir. 1980).

CONCLUSION

The ad hoc judicial modification of the right of rescission under the Truth-In-Lending has resulted in a confusing drift away from the intent of Congress in passing Section 1635(b). If this subsection is to have the intended effect, there must be an unambiguous and strong incentive for creditors to carry out the duties prescribed. Like all other parts of the Truth-In-Lending Act, this section should be liberally construed to affect its purpose. *Mourning v. Family Publications' Services, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed. 318 (1973).

In the absence of circumstances which would make it grossly inequitable to do so, a creditor's failure to respond to a notice of rescission as directed by the Act should result in its forfeiture of property in the customer's possession.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify in accordance with Rule 28(3) that three copies of this Motion for Leave to File Brief as Amicus Curiae and Amicus Curiae Brief have been served upon each of the parties represented by depositing same in the United States Mail with postage prepaid and properly addressed to their Attorneys of Record, Russell E. Gahagan, Gahagan and Gahagan, Attorneys for Respondent, Post Office Box 70, Natchitoches, Louisiana 71457, and Henry B. Bruser III, Gold, Little, Simon, Weems & Bruser, Attorneys for Petitioners, Post Offce Box 6118, Alexandria, Louisiana, 71301.

October _____, 1980

PAUL KENS

CERTIFICATE OF FILING

I certify that to my knowledge Forty copies of this Motion for Leave to File Brief as Amicus Curiae and Amicus Curiae Brief were filed this day in accordance with Rule 28(2) by depositing them at a United States Post Office, first class postage prepaid, correctly addressed to Michael Rodak, Jr., Clerk, Supreme Court of the United States, Washington, D.C., 20543.

October _____, 1980

ROBERT C. SOHNS, JR.